FILE

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Akron Thermal, Limited Partnership for an Emergency Increase in its Rates and Charges for Steam and Hot Water Service.	))))	Case No. 09-453-HT-AEM
In the Matter of the Application of Akron Thermal, Limited Partnership for Approval of a Modification to an Existing Arrangement.	))))	Case No. 09-442-HT-AEC
In the Matter of the Application of Akron Thermal, Limited Partnership for Approval of an Arrangement with an Existing Customer.	))))	Case No. 09-441-HT-AEC
In the Matter of the Application of Akron Thermal, Limited Partnership to Issue Three Promissory Long-Term Notes.	)))	Case No. 09-414-HT-AIS
In the Matter of the Application of Akron Thermal, Limited Partnership for Approval of Revised Tariffs.	)))	Case No. 09-315-HT-ATA

REPLY BRIEF

SUBMITTED ON BEHALF OF THE STAFF OF
THE PUBLIC UTILITIES COMMISSION OF OHIO

Richard Cordray
Ohio Attorney General

Duane W. Luckey
Section Chief

Thomas W. McNamee
Sarah J. Parrot
Assistant Attorneys General
Public Utilities Section

180 East Broad Street, 9th Floor
Columbus, Ohio 43215-3793
614.466.4396 (telephone)
614.644.8764 (facsimile)
thomas.mcnamee@puc.state.oh.us
sarah.parrot@puc.state.oh.us

Attorneys for the Staff of
The Public Utilities Commission
of Ohio

August 4, 2009

TABLE OF CONTENTS

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Akron Thermal, Limited Partnership for an Emergency Increase in its Rates and Charges for Steam and Hot Water Service.	))))	Case No. 09-453-HT-AEM
In the Matter of the Application of Akron Thermal, Limited Partnership for Approval of a Modification to an Existing Arrangement.	))))	Case No. 09-442-HT-AEC
In the Matter of the Application of Akron Thermal, Limited Partnership for Approval of an Arrangement with an Existing Customer.	))))	Case No. 09-441-HT-AEC
In the Matter of the Application of Akron Thermal, Limited Partnership to Issue Three Promissory Long-Term Notes.	)))	Case No. 09-414-HT-AIS
In the Matter of the Application of Akron Thermal, Limited Partnership for Approval of Revised Tariffs.	)))	Case No. 09-315-HT-ATA

REPLY BRIEF
SUBMITTED ON BEHALF OF THE STAFF OF
THE PUBLIC UTILITIES COMMISSION OF OHIO

INTRODUCTION

As this is a reply brief, the Staff of the Public Utilities Commission of Ohio (Staff) will only address those few matters not already addressed in the initial brief and not repeat its arguments or views. Silence should not be viewed as acquiescence in the arguments of any party but rather the opinion that the topic has already been discussed.

Although there is a small miscellany of misunderstandings that need to be corrected herein, the primary topic is legal. Akron Thermal, Limited Partnership (Applicant) is of the opinion that the Public Utilities Commission of Ohio (Commission) has a legal obligation to provide it with the relief sought if an emergency is found. The Applicant is wrong. The statute gives the Commission the obligation to consider the needs of customers and the utility and the discretion to act as it sees fit in the circumstances. Staff believes that the Commission should use this discretion and refuse to act at this time. Only a permanent rate evaluation can provide the assurance needed to take action with the confidence that the action taken will improve, rather than worsen, the situation.

ARGUMENT

A. The Statute Does Not Require the Commission to Grant Relief

The controlling law is simple and broad. It provides:

> When the public utilities commission deems it necessary to prevent injury to the business or interests of the public or of any public utility of this state in case of any emergency to be judged by the commission, it may temporarily alter, amend, or, with the consent of the public utility concerned, suspend any existing rates, schedules, or order relating to or affecting any public utility or part of any public utility in this state. Rates so made by the commission shall apply to one or more of the public utilities in this state, or to any portion thereof, as is directed by the commission, and shall take effect at such time and remain in force for such length of time as the commission prescribes.[1]

[1] Ohio Rev. Code Ann. § 4909.16 (Anderson 2009).

This statute is extraordinarily broad. Each component of the statute is discretionary. As the Supreme Court has noted, under R.C. 4909.16, "the determination of whether an emergency exists, warranting a temporary alteration of rates, and the length of time such altered rates shall remain in effect are within the judgment and sound discretion of the Public Utilities Commission."[2] Thus, it is apparent that, even where an emergency exists, the Commission must use its discretion to determine what, if anything, should, or in this instance can, be done about it.

Applicant attempts to draw an analogy between a base rate case, where the Commission must provide the utility an opportunity to earn the revenue requirement, and an emergency case. There is no analogy. Base rate cases proceed pursuant to R.C. 4909.15. That section includes the mandatory rate making formula. Emergency cases proceed under R.C. 4909.16, which, as already discussed, contains no mandatory provisions at all. That the Commission must act under the former says nothing about the latter.

In sum, the Applicant's legal arguments are unavailing. There is no obligation to give the Applicant what it asks for. The Commission's only obligation in this case is to determine what is best for the public and the utility.

B. **Using Its Discretion, the Commission Should Deny Emergency Relief**

In determining what it should do in this case, the Commission has no helpful precedent to guide it. A review of the history of R.C. 4909.16 does not reveal another situation where it appeared that the utility would not survive regardless of what the

---

[2] *Manufacturers Light & Heat Co. v. Pub. Util. Comm'n*, 163 Ohio St. 78, 80, 125 N.E.2d 183, 184-185 (1955) (citing *City of Cambridge v. Pub. Util. Comm'n*, 159 Ohio St. 88, 111 N.E.2d 1 (1953)).

Commission did. In no earlier case was the Commission asked to throw good ratepayer money after bad. Lacking a guide from the past, the Commission can only look to this situation and try to address it.

In looking at the current situation, it is apparent that the state of knowledge is very low. Without an outside audit and with no thorough base rate review, it is just not possible to really know what the financial status of the Applicant is. All of the analysis in the case was a tower built on sand. To grant an increase on this basis is not reasonable. A requirement that the Applicant return any funds collected over those set in a future rate case is no protection at all. There is no reason to believe that Applicant will exist to repay anything.

The statute requires the Commission consider the interest of both the company and the public. Staff takes the view that the Applicant will not survive regardless of any action the Commission could take. Given this inevitability, the interests of the company do not have an effect on the statutory calculus. The results are the same regardless.

When examining the public interest, there is a difference. If the emergency relief is granted, the customers will pay an additional $4 million in the aggregate and also pay for alternative arrangements.[3] If the emergency relief is not granted, the customers will also pay for alternative arrangements, but because the emergency relief will not have been granted, they will have $4 million more with which to pay for those arrangements. It is very easy to see where the balance lies.

---

[3] Alternate arrangements could encompass customer-owned equipment or different rates to a City-owned or affiliated operator, or different rates paid to a new PUCO-regulated utility. The arrangements could take many forms but something will have to change when the Applicant ceases to function, and everything has a cost.

The Commission should deny emergency relief. The statutory factors demand it. This is the principle of triage. Resources should be directed to those who can be saved, not to those that cannot.

C. **Miscellaneous Clarifications**

As noted in the introduction, there are a few miscellaneous items in the parties' briefs that need clarification.

Mr. Puican is criticized for noting that service to the Applicant's customers will not be jeopardized when the Applicant ceases operation, without having reviewed the agreement between the City of Akron and Akron Energy Systems. The criticism is meaningless. As he stated under cross-examination, Mr. Puican relied on the testimony of the City of Akron's representative Mr. Merolla and various answers to Interrogatories put to the City of Akron by the Applicant. The City of Akron is in a position to know the meaning of its agreements and relying on the City's firsthand knowledge is only sensible.

There is some discussion of what would happen when the Applicant ceases operations, specifically whether Akron Energy Systems would carry the same "baggage" as the Applicant. That discussion misses the point. Staff does not believe that the coming of Akron Energy Systems will solve all problems and is not an advocate for that entity. Rather, Staff points out the existence of the arrangement between the City of Akron and Akron Energy Systems as providing the assurance that there is a plan in place to maintain continuity of service when the Applicant ceases operation. The rates at

which this service will continue are not known. It is not even known if the operation will be PUCO-jurisdictional.[4]

Staff is criticized for advocating a Commission order to terminate the lease between the City and the Applicant. Staff advocates nothing of the sort. The lease is what it is. The Commission has no ability to alter it and the Staff makes no suggestion that it should try. Rather, the Staff recognizes that the Applicant will close no matter what the Commission does. That will have the effect of practically terminating the lease, again, no matter what the Commission does. It is not a recommendation of what should be; it is a recognition of what will be. Staff cannot be criticized for accepting things as they are.

CONCLUSION

As noted in the original brief, Staff recommends the Commission deny the emergency application, reject the notes, and refuse to increase the contract rates.

Respectfully submitted,

/s/ Thomas W. McNamee

Thomas W. McNamee
Sarah J. Parrot
Assistant Attorneys General
Public Utilities Section
180 East Broad Street, 9th Floor
Columbus, Ohio 43215-3793
614.466.4396 (telephone)

[4] Indeed, keeping the operation as a purely municipal function and outside the regulation of this Commission might eliminate some of the "baggage" the Applicant mentions. Such a structure would have positive tax implications and would eliminate the various compliance costs associated with regulation. These economies could be achieved without sacrificing the public interest. The primary function of economic regulation is to prevent a monopolist from extracting excess profits due to its monopoly power. There is clearly no such risk here.

614.644.8764 (facsimile)
thomas.mcnamee@puc.state.oh.us
sarah.parrot@puc.state.oh.us

Attorneys for the Staff of
The Public Utilities Commission
of Ohio

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing **Reply Brief** was served via electronic mail to the following parties of record this 4th day of August, 2009.

/s/ Thomas W. McNamee
Thomas W. McNamee
Assistant Attorney General

Samuel C. Randazzo
Gretchen J. Hummel
Lisa G. McAlister
Joseph M. Clark
McNees Wallace & Nurick LLC
21 East State Street, 17th Floor
Columbus, Ohio 43215
sam@mwncmh.com
ghummel@mwncmh.com
lmcalister@mwncmh.com
jclark@mwncmh.com

Max Rothal
Cheri B. Cunningham
161 S. High Street, Suite 202
Akron, Ohio 44308
Cunnich@ci.akron.oh.us

Barth E. Royer
Bell & Royer Co. LPA
33 South Grant Avenue
Columbus, Ohio 43215-3927
barthroyer@aol.com

Thomas Mullooly
Foley & Lardner LLP
777 East Wisconsin Avenue
Milwaukee, Wisconsin 53202
TMullooly@foley.com

Glenn S. Krassen
Bricker & Eckler LLP
1375 East Ninth Street, Suite 1500
Cleveland, Ohio 44114
gkrassen@bricker.com

E. Brett Breitschwerdt
Matthew W. Warnock
Bricker & Eckler LLP
100 South Third Street
Columbus, Ohio 43215
ebreitschwerdt@bricker.com
mwarnock@bricker.com

Daniel R. Conway
Porter Wright Morris & Arthur LLP
41 South High Street
Columbus, Ohio 43215
dconway@porterwright.com

Christopher J. Niekamp
Bernlohr Wertz, LLP
The Nantucket Building
23 South Main Street, Third Floor
Akron, Ohio 44308-1822
cjn@b-wlaw.com

Linda Murphy
County of Summit
Executives' Office
175 S. Main Street, 8th Floor
Akron, Ohio 44308
LMurphy@Summitoh.net

Joseph F. Hutchinson, Jr.
Kelly S. Burgan
Baker & Hostetler LLP
3200 National City Center
1900 East Ninth Street
Cleveland, Ohio 44114-3485
jhutchinson@bakerlaw.com
kburgan@bakerlaw.com